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788-242—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 538

MY STORE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–24) is reported at 345 F. 2d 494. The Board's Decision and Order (J.A. 3–9)[1] are reported at 147 NLRB 145.

JURISDICTION

The decision of the court of appeals was entered on April 7, 1965 (Pet. 19). The Company's petition for rehearing was denied on June 4, 1965, and the court's decree enforcing the Board's order was entered on July 6, 1965. On September 2, 1965, Mr. Justice

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

Clark extended the time in which to file a petition for certiorari to and including September 9, 1965. The petition for a writ of certiorari was filed on September 7, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly applied the standard of judicial review of Board orders enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. 1009(e)), are set forth at pp. 2–4 of the petition.

STATEMENT

1. In December 1962, a Union [2] campaign was conducted at petitioner's Taylorville, Illinois, store, called My Store, Inc., and the Union, having secured authorization cards from a majority of the employees, filed a petition with the Board on January 24, 1963, seeking an election (J.A. 11; 111–112). A Board agent informed Pasquo Podeschi, president and manager of My Store, Inc., of the filing of the petition and Podeschi immediately directed his son, Marcel, and another employee to ask each employee whether he had been approached by a Union agent and whether

[2] United Retail Workers Union.

he had signed a Union authorization card (J.A. 11–12; 167–169). While this interrogation was being carried out, Podeschi himself interrogated employee Spindel repeatedly concerning his Union adherence and the identity of Union leaders, and also asked him to assist Marcel Podeschi in discovering who among the employees had led the Union campaign (J.A. 12; 121). Another employee, Wiggs, was similarly interrogated by Marcel and Pasquo Podeschi. When Wiggs answered the elder Podeschi's question by stating that he did not know who was behind the Union activity, Podeschi told Wiggs that he thought it was Cooper and Spindel (J.A. 12; 125, 128).

When only 3 of 40 employees admitted having been approached by the Union, and none would admit having signed an authorization card, Pasquo Podeschi required each to sign a blank slip of paper so that he might have their signatures compared with those on the authorization cards filed with the Board's Regional Office (J.A. 12; 168–170). Several days later, at a meeting in the Board's Regional Office, Podeschi had the solicited specimen signatures compared with those on the authorization cards and was assured that the card signatures were genuine (J.A. 12; 152–153).

The next morning, Podeschi called a meeting of all employees. He declared that they were "liars" and "cheat[s]"; announced the revocation of several, if not all, of the privileges previously afforded employees; declared that he could eliminate 15 jobs, personally; reviled employee Cooper; stated that he could sell the store at any time; and asserted that the person

"who started this union got a hundred dollars", that the employees could read about the Union in the "Annals of Crime", and that the Union officials were "crooks" (J.A. 13; 114–115, 121–122, 161). Turning to employee Sartore, who had earlier admitted being approached by the Union, Podeschi told him that his son (also a store employee) would no longer be needed except on weekends (J.A. 13; 127, 137).

Two or three days later, in a conversation with employees Sartore and Banfield, Podeschi asked Sartore how he would like to work for a regular clerk's salary (about 60 percent of his present salary) (J.A. 13, n. 6; 136). He then asked both employees how they would like to have their hours cut (J.A. 13; 139).

During this week, Podeschi again asked Wiggs whether he knew "who was behind" the Union. When Wiggs again replied that he did not know, Podeschi stated that he now knew "for sure" that the organizers were employees Cooper, Spindel, Walker, Garmon and "the school kids" (regular part-time employees participating in a special program combining employment and regular high school classes) (J.A. 13, n. 6; 128).

On Wednesday of the next week, each employee received an individual schedule of hours to be worked. Employees Cooper, Spindel, Walker, Ginger, Shanks, Mahan, the younger Sartore, and Reed found their hours cut by as much as 60 percent (J.A. 14, n. 7; 275–276, 273–280, 281–288).[3]

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[3] Ginger, Mahan, Sartore and Reed were "school kids". Shanks had recently graduated from the school program and had attended Union meetings at which at least two of Podeschi's relatives had been present (J.A. 143).

2. The Board conducted an election on February 21, 1963, which the Union won (J.A. 14; 49). Thereupon, Podeschi announced that he would have to lay off 15 to 17 employees—nearly half the work force (J.A. 15; 104, 118, 156). A Union agent dissuaded him from such action pending an opportunity for discussion (J.A. 15; 104). Five days later, and before any discussion could be had, the Company discharged employee Cooper, who had acted as Union observer at the election and whom Podeschi knew to be an organizer (J.A. 15, n. 9; 114, 128).

On February 27, the day after Cooper's discharge, representatives of the Union and the Company met for the first time (J.A. 15, n. 9; 51–52). In return for the Union's agreement to hold in abeyance an unfair labor practice charge based on Cooper's discharge and the Company's pre-election unfair practices, the Company agreed to reinstate Cooper, to discuss remuneration for the eight employees whose hours had been cut, and to maintain current terms and conditions of employment (J.A. 15; 51).

Thereafter, the Union requested certain information, such as the names of employees, their hiring dates, job classifications, current pay rates, hours worked per week, employee benefits, hours of business, and job duties required of employees away from store premises (J.A. 15; 224–225). Within a short time, the Union was given information which purported to be the employees' current pay rate (J.A. 15; 73). This information was grossly incorrect. The company, although apprised of this fact, never

supplied correct information (J.A. 15; 82). Some, but not all, of the other information was transmitted to the Union, after repeated requests, during the four months that followed (J.A. 17, n. 11; 27, 85).[4]

Negotiations were thereafter carried on by the parties until April 28 or 29, when a strike was called. During the negotiations, Podeschi expressed continuing doubt as to the Union's status, even after its certification by the Board, stating that he had written to Washington concerning this question and the answer might obviate the necessity for any further negotiation (J.A. 16; 54–55, 64); flatly refused to discuss any remuneration for the eight employees whose hours had been cut (J.A. 54, 71–72); rejected the Union's proposed pay schedule on the ground that it had been drawn up in terms of job classifications (J.A. 55–56); refused to consider a contract term beyond one year, because at that time there might be an election and "the Union won't be here * * *" (J.A. 16; 55); refused initially to consider an employee lunchroom or even to allow employees to continue the practice of eating on store premises, and eventually conceded that employees might eat lunch in the store if they received individual permission from him.

[4] A list of classifications of employees was requested in the Union's first letter. The information was never provided. Podeschi maintained throughout the several months of negotiations which followed that there were, in fact, no classifications, thus precluding any discussion of an important section of the Union's proposal dealing with wages (J.A. 16; 55, 83–84). When, at the Board hearing, Company payroll records were acquired by subpoena, it was discovered that the employees were, and had been, classified by the Company (J.A. 275–375).

3. On April 28 or 29, the Union called a meeting of its members in the Taylorville area (J.A. 17; 94). The Union's executive director told the members about the difficulties encountered in attempting to negotiate with the Company, about the Company's unlawful failure to furnish relevant personnel information to the Union upon request, about the continuous discriminatory reduction in hours suffered by eight Union adherents, about the discriminatory withdrawal of privileges previously enjoyed by the store employees, and about the threats and interrogations which had taken place before the election (J.A. 18; 96–97). All were described as unfair labor practices that were the subject of a pending charge before the Board's Regional Office. The members decided to take a strike vote by secret ballot. All present, save one who abstained, voted to strike at midnight on May 2 (J.A. 18; 97).

During the day before the scheduled strike, Podeschi cautioned a number of employees, stating variously that those who went on strike could consider themselves fired, that he would permanently discontinue strikers' insurance, and that he would see to it that any regular part-time students who struck were denied their high school diplomas (J.A. 18; 123–124, 129).

Notwithstanding Podeschi's threats, 22 of his employees went on strike on May 2 (J.A. 18; 145). During the strike, the Union published newspaper advertisements and distributed handbills seeking to enlist public support. These advertisements and

handbills, which are reproduced in the record (J.A. 383, 385), contained "a brief outline on the" Union's "position and reasons" for the strike, making reference to the parties' differences in their contract negotiations and the unfavorable working conditions at the store.

Negotiations between the parties continued. At the first session following the strike, management negotiators represented that they had lost their notes and could remember nothing of the previous meetings (the most recent of which had been held two weeks earlier) and, in consequence, could recall no areas of agreement from which to proceed (J.A. 19; 77). Wage demands for meat department employees were rejected on the basis that there were no employees so classified (J.A. 19; 76). In reality, one fourth of the employees in the unit were so classified by the Company (J.A. 275, 298, 307, 309, 334, 336, 345, 355, 368, 370).

After four months of negotiations, the Company produced a counterproposal on July 11 (J.A. 19; 79). The proposal not only contained concessions not previously discussed, but omitted items on which agreement had previously been reached (J.A. 19; 80). At the close of this meeting, the Union made an unconditional offer to return to work on behalf of the 19 employees who were still on strike (J.A. 19–20; 271–272). Company representatives made no immediate response, but several days later advised the Union that striking employees would be rehired, two or three at a time on the basis of seniority, when and if additional employees were needed (J.A. 20; 87, 262–263).

Negotiations continued fruitlessly. At the time of the Board hearing in September 1963, no contract had yet been reached by the parties. Among the issues still dividing them were wages, insurance, and back pay to remedy the earlier discriminatory reduction in hours (J.A. 30; 85–86).

4. The Board found that the Company had violated Section 8(a)(1) of the Act by threatening and interrogating employees in the manner set forth above; Sections 8(a) (3) and (1) of the Act by discriminatorily eliminating long-standing employee benefits and by reducing the scheduled working hours of eight named employees; and Sections 8(a) (5) and (1) of the Act by failing to bargain in good faith with the Union. In addition, the Board found that the strike had been substantially motivated by the Company's unfair labor practices and, accordingly, that the Company had also violated Sections 8(a) (3) and (1) of the Act by rejecting the strikers' unconditional application for reinstatement (J.A. 4). The Board ordered the Company to cease and desist from the unfair labor practices found, and from infringing in any other manner upon the rights guaranteed employees by Section 7 of the Act. Affirmatively, the order required the Company to bargain in good faith with the Union upon request; to offer reinstatement to those striking employees whose unconditional offer to return it had rejected, and to make them, as well as those employees whose hours of work had been discriminatorily reduced, whole for any loss in pay they may have suffered as a result; and to post appropriate notices (J.A. 5–7).

The court of appeals enforced the Board's order in its entirety (Pet. 19–24).

ARGUMENT

The petition presents no question warranting further review.

Petitioner does not challenge the findings of the Board, upheld by the court below, that, prior to the commencement of the strike on May 2, 1963, the Company engaged in a series of unfair labor practices in violation of Sections 8(a) (1), (3), and (5) of the Act. Its sole ground for seeking review (Pet. 10) is that the court below, in affirming the Board's finding that the strike was prompted at least in part by the preceding unfair labor practices and not (as petitioner contended) solely by economic considerations,[6] misapprehended and misapplied the standard of judicial review enunciated in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. This assertion is without foundation and rests upon a palpable misreading of the opinion below.

Contrary to petitioner's contention (Pet. 12), the court below did not say that, in assessing the substantiality of the evidence supporting the Board's finding as to the reasons for the strike, it would disregard evidence of pre-strike statements by the Union; nor did it hold that Board findings must be

[6] This finding is the predicate for the Board's order requiring petitioner to offer reinstatement to the strikers whose unconditional application for reinstatement the Company rejected on or about July 11, 1963, and to discharge, if necessary, any replacements in order to provide work for these strikers (Pet. 26, 27).

upheld unless the evidence conclusively demonstrated that the Board was wrong. The court's statement that evidence of the Union's publicity during the strike was not conclusive as to the motivation for the strike obviously meant simply that such evidence was not completely dispositive of the issue, but was merely one of the factors to be taken into account together with the other pertinent factors. The record discloses (*supra,* p. 7) that immediately prior to the strike vote the Union informed the employees of the employer's illegal course of conduct, and that, as the Board found (Pet. 50), the decision to strike, at least in substantial part, grew out of that misconduct. The fact that the Union's appeals for public support may not have attributed the strike to the employer's unfair labor practices, although a circumstance to be taken into account, did not negate the other evidence in the record showing that the strike was at least partially in protest against the employer's illegal conduct.

Also without merit is petitioner's contention (Pet. 12) that the court below, by its use of the phrase "Union publicity *during* the strike" (emphasis added), indicated that it had restricted its consideration of the evidence concerning the reasons for the strike to Union statements preceding the strike, and thereby failed to consider the evidence on the record as a whole. Neither the quoted language nor the opinion below in its entirety permits such a tortured reading. The phrase "publicity during the strike" is merely descriptive and in no way connotes the restrictive evidentiary rule which petitioner reads into it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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